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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 682

THE CALIFORNIA COMPANY,
A DIVISION OF CHEVRON OIL COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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FEDERAL POWER COMMISSION,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The California Company, a Division of Chevron Oil Company, petitions for a writ of certiorari to review the judgment entered in this case on March 19, 1970, and June 16, 1970, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals (Cont. App. A and B)[1] are not yet reported. The opinion and orders of the

1. References to the Appendices to the petition filed in this case by Continental Oil Company, et al., are abbreviated in this petition as follows: "Cont. App. ....."

Federal Power Commission (Cont. App. D) are reported at 40 FPC 530. The Commission's opinion and orders on rehearing (Cont. App. E) are reported at 41 FPC 301.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970 (Cont. App. A). A per curiam order and supplementary opinion on rehearing was entered June 16, 1970 (Cont. App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)).

QUESTIONS PRESENTED

Petitioner adopts questions 1 through 4 presented in the petition filed in this case by Continental Oil Company, et al., and presents the following additional questions:

1. In September 1968, the Commission issued its decision in this case, reducing rates for gas in the Southern Louisiana area—an area which produces one-third of the nation's gas. Shortly thereafter, all segments of the industry filed statements with the Commission pointing out that evidence available since the closing of the record indicated the imminence of a grave national gas shortage. While the case was pending on review in the Court below, the Commission made public a report of its Staff that a serious gas shortage was imminent. In March 1970, the Court below filed its decision. It referred to the Commission's Staff Report, took judicial notice of public statements by members of the Commission referring to the seriousness of the supply situation, expressed grave concern about the gas shortage so disclosed and pointed out that the Commission in its decision had failed to make findings on the crucial issue of the effect of the rates it prescribed upon the supply of gas, i.e., upon whether the rates fixed would attract the capital required to

find and develop an adequate gas supply. The Court nevertheless affirmed the Commission's decision, but did so conditionally, holding that the Commission had power to reconsider its decision and to change all rates retroactively, as well as prospectively, if it deemed such action in the public interest. Settlement discussions have been instituted, under the chairmanship of a representative of the Commission, among all interest groups—producers, pipelines, distributors, state commissions and the Commission's Staff. These discussions, which have continued over several months and are presently in progress, look toward a new order by the Commission regarding the rates here under review.

But for one circumstance—the Commission's failure to date formally to reopen the proceedings in this case—review at this time, by this Court, would be premature. Absent such reopening, petitioner is compelled to file this petition within the statutory period to protect its right to a review of the decision of the Court below. The question presented is:

> Whether in the present posture of the case, including the pendency of the settlement proceedings, this Court should grant all writs of certiorari in this case and, without argument, forthwith remand the case to the Court below with instructions to direct the Commission to reopen the case and proceed to such orders as it deems in the public interest.

2. The Commission based its rates for Southern Louisiana sales of gas on costs. Yet, in prescribing Southern Louisiana rates, the Commission used average nationwide exploration and development costs rather than the exploration and development costs actually expended by producers in the Southern Louisiana area. It did so without making any attempt to determine whether the average nationwide

costs are typical and representative of Southern Louisiana costs. The question presented is:

> Whether the Commission erred in prescribing Southern Louisiana rates on the basis of average nationwide costs, rather than Southern Louisiana area costs, contrary to the holding of this Court in *B. & O. R. Co. v. Aberdeen & R. R. Co.* (1968) 393 U.S. 87.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are set out in Appendix F to the Petition filed in this case by Continental Oil Company, et al.

STATEMENT OF THE CASE

Petitioner adopts the statement of the case in the petition filed in this case by Continental Oil Company, et al., with the following supplementary statement:

In 1961 the Federal Power Commission commenced its first Southern Louisiana area rate case, Docket No. AR61-2.[2] The purpose of the proceeding was to establish just and reasonable rates for producer gas sales in the Southern Louisiana area—an area consisting of approximately 54,000 square miles, and providing one third of the nation's supply of gas sold in the interstate market. Twenty-eight eastern and mid-western states and the District of Columbia (an area in which approximately 70% of the nation's population resides) depend on Southern Louisiana gas. As the Court below noted, the Southern Louisiana area is the most important gas-producing

2. The Commission designates its area rate cases by the year of filing. Thus, "AR61-2" identifies the second area rate case instituted in 1961.

area in the United States and is among the most promising areas of the country for additions to the nation's gas reserves, an area in which "new exploration needs especially to be encouraged" (Cont. App. A 22, 11).

On September 25, 1968, the Commission issued its decision in the instant case, effective October 1, 1968, prescribing rates for Southern Louisiana gas sales to be observed for the future and to serve as a basis for refunds.

Petitioner and others sought rehearing, contending among other things that there was insufficient cost evidence in the record to prescribe rates for the offshore portion of the Southern Louisiana area.[3] While the case was pending before the Commission upon rehearing, parties representing the various interest groups in the case—producers, distributors, pipelines and state commissions—filed "urgent pleas," motions to reopen, motions for further argument, requests for investigation and other statements urging the Commission to consider evidence of a national gas shortage —evidence available only after the close of the record (App. B 56).

Since that time, public statements of the members of the Federal Power Commission have, as the Court below noted, disclosed "the seriousness of the supply problem" (Cont. App. A 53).[4] For examples, Commissioner Bagge, May 13, 1969: "* * * to an extent not yet determined, interstate pipelines have not been able to fill certain incremental requirements" (App. B 89); Commissioner Brooke, September 9, 1969: "I seriously doubt that the most intensive of

3. In its Opinion No. 546 the Commission admitted this weakness (Cont. App. B 162). The offshore region was a new producing area in the 1960 test year used by the Commission, and adequate data simply was not available.

4. The Court below took judicial notice of public statements of the Commissioners (Cont. App. A 53, n. 98).

drilling programs would enable us to prevent further deterioration in the total reserves situation" (App. B 98-99); Commissioner O'Connor, September 10, 1969: "* * * the increased market demand for the 1970-71 heating season indicates a need for new gas in excess of two trillion cubic feet for which no producer supply contracts have yet been executed" (App. B 101); Commissioner Bagge, October 30, 1969: "A number of pipeline companies and distributors have informed the Commission that they are unable to contract for new gas supplies, and in one case a major pipeline company cited this precise reason for attempting to withdraw a part of an expansion program for which certificate authority was being sought" (App. B 108-109); Chairman Nassikas, January 30, 1970 (before a Senate subcommittee): "* * * various sections of the United States may be unable to meet demands of distribution companies for new service in the winter of 1970-1971" (App. B 129); Commissioner Bagge, February 24, 1970: "* * * [the] industry [is] confronted with a new level of demand stimulated, in part, by regulation which at the same time has, in part, inhibited expansion of the base supply" (App. B 132); Commissioner Carver, May 15, 1970: * * * localized [gas supply] problems * * * will occur if next winter's weather is even normally bad" (App. B 144); Chairman Nassikas, June 9, 1970: "One of the most difficult and serious problems * * * is the growing evidence of a short-term deficiency in gas supplies to meet incremental market demand which is projected to grow at a compound rate of 5.3 percent per year during the 1970's" (App. B 149).

Within the past few weeks, on August 10, 1970, Chairman Nassikas summarized the situation:

> "We have conducted a comprehensive survey over the past few months of the natural gas supply situation in the Northeastern, Middle Atlantic and Middle

> Western states. Our survey and conferences with state public regulatory officials, representatives of transmission and distribution companies and gas consumers indicate that the gas supply situation has become more critical—as was reasonably evident for some time from an analysis of staff studies undertaken by the Commission and other discernible evidence and trends. Increasing applications to the Federal Power Commission for authority to import gas from Canada and other foreign sources are further evidence that domestic demand is not being met by domestic supply. Major pipeline companies have announced limits on increases in daily and annual deliveries to industrial customers. There have also been proposals for significant reductions in service levels. Other pipeline and distribution companies have instituted measures to limit the rate of growth of sales. On June 4, 1970, the Independent Natural Gas Association of America, in a letter to me, reported that a significant deficiency in meeting incremental demand is anticipated for the 1970-71 winter by the twelve major interstate transmission companies surveyed. This deficiency in supply for incremental load approximated three billion cubic feet per day." (App. B 152-153).

On March 20, 1969, the Commission issued its decision on rehearing (Cont. App. E). This decision made no material change in the rates prescribed in the Commission's earlier decision. But significantly, in response to the new evidence of a gas shortage, as well as to the claimed inadequate offshore data, the Commission simultaneously commenced a new area rate proceeding, Docket No. AR69-1, to determine area rates for gas sold from the offshore area on and after October 1, 1968 (App. B 1).

Petitioner and others petitioned the Court of Appeals for review of the Commission's decision. Shortly before the oral argument, the Commission released its Staff's

Report on National Gas Supply and Demand. At the Court's request, this Report was lodged with the Court. Among other things, the Staff reported:

(a) "only a few years remain before demand will outrun supply" (App. B 45);

(b) "Regional gas supply deficiencies are probable even when the national R/P ratio[5] is still at or even above the 10 level" (App. B 48); and

(c) "The R/P ratio for South Louisiana will drop to the critical level of 8 in 1973 after which production growth will be at progressively slower rates" (App. B 48).

The case was argued twice before the Court below.[6] Two days before the second argument, on December 15, 1969, the Commission enlarged its new proceedings (AR69-1) to include all gas sales in the entire Southern Louisiana area, the region which is the subject of the instant case (App. B 9).

On March 19, 1970, the Court of Appeals issued its decision (Cont. App. A). It affirmed the Commission's decisions, but with "serious misgivings" (Cont. App. A 56). Taking cognizance of the Staff Report and of the public statements by the members of the Commission, the Court noted that a "serious [gas] shortage, in fact, may already be unavoidable" (Cont. App. A 52). The Court pointed out that the Commission had made no attempt to determine whether its rates were adequate to call forth sufficient gas supplies,[7] and had made no findings which would enable the Court to review or determine that question. Over and over, the Court

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5. "R/P ratio" is the ratio of reserves to production. "F/P ratio" is the ratio of new gas findings to production.

6. After the first argument, the case was reassigned to a second panel.

7. This was not just a procedural error of failing to make a finding. The Court held that "the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Cont. App. A 50).

emphasized the seriousness of this deficiency in the Commission's decision.[8]

"There is evidence of a serious supply deficiency" (Cont. App. A 3).

"The evidence that there is a deficiency seems very strong * * *" (Cont. App. A 17-18).

"We are troubled greatly by the fall in the FP ratio, for example, and cannot know whether it is so serious as to warrant some immediate, extraordinary action by this Court. The point is that without adequate consideration by the Commission of ultimate market impact, even slight troublesome facts assume fearful proportions. In this case, the producers, as well as the FPC Staff, predict a severe gas shortage, with disastrous effects on consumers and the economy alike. This Court has little inclination to join the Commission in presiding over such a result" (Cont. App. A 47, n. 87).

"* * * the circumstances that have developed since its [the Commission's] decision indicate a possibility, indeed perhaps a certainty, that the supply of gas is dangerously low. A serious shortage, in fact, may be unavoidable * * *" (Cont. App. A 52).

"* * * the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Cont. App. A 50).

"The [Staff] report is * * * precisely the kind of 'assessment of consequences' that we find lacking in the Commission's decision here" (Cont. App. A 54).

"[The Commission's] conclusionary statements to the effect that the rate is adequate or that there will probably be no need for changes in the future (these are statements the Commission has made here) amount only to so much whistling in the dark" (Cont. App. A 68).

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8. And see the dissenting opinion of Commissioner Carver in the Commission's decision on rehearing, Cont. App. E 72, et seq.

The Court criticized (a) the Commission's failure to determine how much gas would be needed to satisfy the public's demands, and (b) the Commission's failure to measure the capital needed to find and produce the required amount of gas (Cont. App. A 66-67).

Exploration for and development of gas reserves requires the expenditure of vast sums of capital. According to the Commission's cost determinations in this case, it would require an expenditure of more than $40,000,000 to find and develop a new gas reserve of one trillion cubic feet.[9] Simply to replace the gas which the Staff Report indicates will be produced in Southern Louisiana from 1969 through 1973,[10] the industry must find new reserves of 42.8 trillion cubic feet. Using these findings of the Commission and its Staff, it is apparent that the producing industry must spend over $1,700,000,000 for exploration and development in Southern Louisiana during the next five years merely to replace gas from that area consumed during that period. And that, of course, is exclusive of the additional capital the industry would have to spend for production costs.

The Court was particularly critical of the Commission's failure to determine the consequences of its rates upon the producing industry's future investments in gas for the interstate market:

> "As to the crucial issue of sources for adequate financing, the Commission's findings, and for that matter the evidence, are almost nonexistent. The Commission has made only conclusionary statements to the effect that capital from outside sources will be available at the rate it has set. This is a tenuous basis for our affirm-

9. The Commission determined that the exploration and development cost of new gas was 4.14 cents per Mcf (Cont. App. D 84).

10. Staff Report, p. 16 (lodged with the Court below, *supra*, p. 8).

ance. * * * The Commission has considered few of these matters in this case either prayerfully or otherwise, and this deficiency is of great concern to a reviewing court" (Cont. App. A 63-64).

After it had thus exposed the many errors and lack of essential findings by the Commission, and the vast public injury which could result from those errors, the Court nevertheless felt that it was in a dilemma:

"Throughout this discussion, we have been forced to navigate between the Scylla of disobeying *Permian* and the Charybdis of condoning inadequate Commission findings in the face of a possible supply deficiency" (Cont. App. A 60).

To thread this path between "Scylla" and "Charybdis" the Court adopted the novel procedure of "affirming", but in such a way as to make it clear that full power was restored to the Commission to correct its errors by making such changes both in past and future rates as are required by the public interest:

"We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective adjustments in this case if it finds that it is in the public interest to do so" (Cont. App. B 2).[11]

11. While the case was pending before the Court below on rehearing, the majority of the Commission requested the Court to remand the proceedings:

"In order that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion, a remand is respectfully requested" (App. B 54).

In the interval between the Court's original decision and its decision on rehearing, the Presiding Examiner in the proceedings in Docket No. AR69-1 convened a settlement conference[12] of all parties (App. B 29-30). Since then, all interest groups—producers, pipelines, distributors, state commissions and the Commission's Staff—have continuously engaged in settlement discussions in an effort to reach agreement on a proposal or proposals to submit to the Commission.[13] In the light of the Court's decision in the instant case, all Southern Louisiana rates, those to be effective before and after October 1, 1968, have been the subject of these settlement discussions. Indeed, refunds which may be ordered in respect of past rates have been a principal subject of discussion. Proposals have been made designed to assure that refund amounts ultimately found to be owing will be used in an effort to find new reserves to be dedicated to the interstate market.

On July 2, 1970, the major producer parties filed a motion with the Commission requesting it to reopen these proceedings (App. B 32). To date, although the Commission has issued a stay of its Opinion No. 546, as amended (App. B 31) the Commission has not acted on this motion or otherwise reopened the proceedings.

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12. "Settlement" in a proceeding of this kind differs, of course, from the usual settlement in a litigated case. Any proposal agreed to by all or some of the parties cannot become effective until and unless approved by the Commission on an appropriate record.

13. The settlement discussions have taken place since the original decision of the Court below. It appears appropriate to bring their pendency to the attention of this Court, however, since they relate to the question whether review by this Court is premature at the present time and are akin to facts rendering a cause moot. See *California c. San Pablo &c. Railroad* (1893) 149 U.S. 308, 311-312, 313-314; *South Spring Gold Co. v. Amador Gold Co.* (1892) 145 U.S. 300, 301-302.

REASONS FOR GRANTING THE WRIT

Petitioner adopts the reasons for the granting of the writ presented in the petition filed in this case by Continental Oil Company, et al., and presents the following additional reasons:

I

For the reasons manifest in the Statement above, and for those set forth in the petition filed in this case by Continental Oil Co., et al., the decision below, if permitted to operate as an affirmance of the Commission's decision, is clearly erroneous. Further, the importance of the case to the nation's economy can not be overstated. However, in the posture in which the case stands, it is equally clear that it would not serve the public interest, or be consonant with an appropriate exercise of this Court's jurisdiction, for this Court to review at this time the complex questions presented on this 35,000 page record—compiled over eight years in the Commission and in the Court below.[14] In a very real sense the administrative process has not been completed. The Court below left it for the Commission to reopen the case. In fact, the Court could not more strongly have indicated that this would be the appropriate action for the Commission to take. A majority of the Commission requested that the case be remanded. The current settlement negotiations seek to arrive at rates which are fair to the consumer and at the same time sufficient to attract needed capital for exploration and development of new supplies of gas.[15] These negotiations appear to furnish the best hope for the earliest determination of the issues in such manner as to serve the urgent public need.

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14. The vast size of the record is referred to by Commissioner Carver in his dissenting opinion on rehearing (Cont. App. E96).

15. The next settlement discussion is scheduled for September 14, the day this petition is filed.

In this situation, we respectfully submit that the appropriate action for this Court to take is to grant the petitions for writs of certiorari filed in this case and forthwith remand the case to the Court below with instructions to direct the Commission to reopen the case and proceed to such further order as it deems in the public interest. After the ultimate order of the Commission is promulgated, the issues now presented on this record may no longer be present, or may be resolved in such manner as to invoke no review. Such a disposition of the case will also permit the Commission, through the settlement negotiations, to expedite the entry of a final order and thus eliminate the uncertainties which are contributing to the critical gas shortage. Such final order would, of course, be subject to review. No party to these proceedings will suffer a loss of its right to a judicial determination of any question now presented, either on this record if still relevant, or on the record upon which the new order is based.

II

The Commission fixed maximum rates for South Louisiana on the basis of average national exploration and development costs—in the absence of any finding that the national costs are typical and representative of area costs, and in the face of petitioner's proof to the contrary. The approval by the Court below of rates so fixed is contrary to the decision of this Court in *B. & O. R. Co. v. Aberdeen & R. R. Co.* (1968) 393 U.S. 87. In that case, a railroad division case, this Court held "that territorial average costs [comparable to the average national costs here] could not be used consistently with the statutory requirements for precise and relevant findings without any evidence relating to the territorial average costs to the North-South traffic [comparable to area costs in this case]." (393 U.S. 87, 91).

The Court below sought to distinguish the *Aberdeen* case on the grounds (a) that the national costs in this case were found to be "the best available index to costs in Southern Louisiana," (Cont. App. A, 42-43) and (b) that gas exploration is a nationwide activity, while railroad service is tied to the region where the rail equipment is located (Cont. App. A 43). The first distinction is contrary to the record. Petitioner proved the Southern Louisiana exploration and development costs. The second distinction would be valid only if all producers whose Southern Louisiana rates were fixed by national costs engaged in nationwide exploration. This also is not the case. Petitioner, prior to October 1, 1968, explored almost exclusively in South Louisiana.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case summarily remanded to the Court below with instructions to direct the Commission to reopen the case and proceed to such orders as it deems in the public interest.

Dated September 14, 1970.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Supreme Court, U.S.
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Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692 AND BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692

The following companies are herein referred to as United Distribution Companies:

AMERICAN NATURAL GAS SYSTEM:
Michigan Consolidated Gas Company
Wisconsin Gas Company

CENTRAL ILLINOIS LIGHT COMPANY

CENTRAL ILLINOIS PUBLIC COMPANY

CITIZENS GAS AND COKE UTILITY

THE DAYTON POWER & LIGHT COMPANY

EQUITABLE GAS COMPANY

ILLINOIS POWER COMPANY

MICHIGAN GAS UTILITIES COMPANY

(List of Companies continued on next page)